

In The
Supreme Court of the United States
October Term, 1989

MARY MAYER,

Petitioner,

-against-

CHESAPEAKE INSURANCE COMPANY LIMITED, DWG
CORPORATION, NVF COMPANY, NATIONAL
PROPANE CORPORATION, APL CORPORATION,
CHESAPEAKE FINANCIAL CORPORATION,
SOUTHEASTERN PUBLIC SERVICE COMPANY,
VICTOR POSNER, PEABODY INTERNATIONAL
CORPORATION, THE PULLMAN COMPANY,
and PTC ACQUISITION, INC.

Respondents.

PETITIONER'S REPLY BRIEF

RICHARD M. MEYER
One Penn Plaza
New York, New York 10119-0165
(212) 594-5300
Attorney for Petitioner

Of Counsel:

MILBERG WEISS BERSHAD SPECTORIE
& LERACH
One Penn Plaza
New York, New York 10119-0165



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No. 89-663

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PETITIONER'S REPLY BRIEF

POINT I

DIRECT PECUNIARY BENEFIT IS NOT THE
TEST OF BENEFICIAL OWNERSHIP UNDER
SECTION 16(b)

Respondents contend that "direct pecuniary benefit" is the indispensable test of beneficial ownership under Section 16(b). They rely heavily upon two SEC releases 50 years apart. However, the 1938 Release, Exchange Act Release No. 34-1965 [Permanent Binder 4] Fed. Sec. L.

Rep. (CCH) ¶26,041 (December 21, 1938), has been superseded. And respondents have misstated the contents of the 1988 release, Exchange Act Release No. 26333 [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,343 (December 2, 1988).

The 1938 release relied upon by respondents (Br. 9) has been superseded by numerous judicial and SEC pronouncements. (See Pet. 6-8). Exchange Act Release No. 34-18114, entitled "Interpretive Release on Rules Applicable to Insider Reporting and Trading", 4 Fed. Sec. L. Rep. (CCH) ¶23,062 (September 23, 1981), clearly discarded the requirement of direct pecuniary benefit. In that release, the SEC posed and answered numerous questions regarding the interpretation of Section 16 and the rules promulgated thereunder. One question asked whether the beneficiary of an irrevocable trust which holds shares of common stock of a registered company would be regarded as the beneficial owner of those shares if he has the right to vote them but "receives income from them only in the discretion of an independent trustee." The SEC answered as follows:

Answer: Yes. As already noted, the term "beneficial ownership" of securities has not been specifically defined by the Commission for purposes of Section 16. It is generally recognized, however, that among the hallmarks of beneficial ownership are the right to control voting and transfer; the right to receive or control the disposition of income; and the right to control disposition of proceeds upon liquidation. Not all of these characteristics need be present in order for beneficial ownership to exist. In this case, since the insider may receive income from the trust, and since he does have the right to vote

the trust securities, it appears that he receives benefits sufficient to constitute him the beneficial owner of securities held in the trust.

id. at 19,063-21-22 (emphasis added).

See also, "Section 16 of the Exchange Act", Exchange Act Release No. 34-7793, 4 Fed. Sec. L. Rep. (CCH) ¶26,032 (January 19, 1966).

Nor does the fact that the intermediary companies conduct business (Resp. Br. 3, 9) insulate the Posner Group from liability. In 1953, the then SEC chairman stated: "The primary character of the business of a holding company is . . . irrelevant if the company is in fact used as a corporate cloak to hide insider trading." Cook and Feldman, *Insider Trading Under the Securities Exchange Act*, 66 Harv. L. Rev. 385, 402 n.73 (1953).*

Respondents concede that the SEC has recognized that beneficial ownership depends upon the potential for control (Br. 9). They contend, however, that the SEC position is an expansion of existing law (Br. 10), quoting footnote 57 from the 1988 Release. However, the quotation refers not to the definition of beneficial ownership (which the SEC points out has evolved under case law), but rather to the determination of which *transactions* should be subject to reporting and profit recovery.

* Respondents seek to build upon the opinions of the courts below by suggesting that the \$5,600,000 payment was for settlement of litigation (Br. 4, 12). However, as the dissent noted (A. 40), the settled actions were *against* Posner and the threatened counterclaims were derivative in nature, so that sale of the stock terminated his standing to maintain them.

Indeed, the text to which footnote 57 is appended specifically refers to Proposed Rule 16a-1(a)(2) which refers to a number of types of transactions, some of which were not previously covered by decided cases. Thus, the portion of the Release quoted by respondents serves to highlight the fact that direct pecuniary benefit was not a pre-existing requirement that the SEC eliminated in 1988, for had it been the SEC's belief that it was expanding the law, the agency would have said so as it did in the case of transaction specification.

POINT II

THE POSSIBILITY OF A NEW SEC RULE DOES NOT MILITATE AGAINST THE NEED FOR THIS COURT'S DETERMINATION OF THE ISSUES PRESENTED BY THE PETITION.

The respondents assert that this Court should refuse to take this case and do justice because the SEC may adopt a rule which will be determinative of situations such as the present one. Putting aside the fact that the SEC rule proposal was made one year ago and has not yet been adopted, its adoption (if ever) would hardly resolve the issues presented by this case. This Court has stated that it would not afford the SEC's views "the deference to which the views of the agency administering a statute are usually entitled" in cases involving interpretation of Section 16(b). *Foremost-McKesson v. Provident Securities Co.*, 423 U.S. 232, 259 (1976). It was presumably a reliance upon the apparent divergence between Commission and court holdings that led the court below to its erroneous decision. At the time of its decision, the SEC had already issued its interpretive release and proposed rules, and

these had been called to the court's attention. Nevertheless, the Court of Appeals declined to give the agency the deference which one would expect that it be accorded. Accordingly, it is necessary for this Court to resolve this conflict and issue an authoritative interpretation of the statute.

CONCLUSION

For the reasons set forth above and in the Petition, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
November 27, 1989

Respectfully submitted,

RICHARD M. MEYER
One Penn Plaza
New York, New York 10119-0165
(212) 594-5300
Attorney for Petitioner

Of Counsel:

MILBERG WEISS BERSHAD SPECTHRIE
& LERACH
One Penn Plaza
New York, New York 10119-0165